Appellees do not discuss THIS COURT'S OPINION construing the Missouri demurrer statute in

MAGWIRE v. TYLER,
17 WALL. 253,286.

Perhaps it is because the Suggestions in support of the Motion sought to be stricken call attention thereto that Appellees are so anxious to have same stricken.

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In the Supreme Court of the United States

October Term, 1946.

LOUISE MCGREW MOFFETT AND LOUISE MCGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased. *Appellants,*

VS.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP, *Appellees.*

No. 318.

APPELLANTS' REPLY TO APPELLEES' TYPEWRITTEN MOTION TO STRIKE, SERVED ON APPELLANTS ON OCTOBER 9, 1946.

Appellees have accused appellants of prematurely filing the motion to prevent the printing of unnecessary and immaterial matter included in the transcript forwarded to this Court, which appellees have designated as necessary to be printed.

Counsel for appellants knew what the rules of this Court were when said motion was filed, but thought it a provident thing to do to attempt to prevent the printing

of said matter, regardless of who might be called upo
in the final analysis to pay the expense.

We note what appellees say on page 6 of their sai
typewritten motion, casting aspersions upon appellants
counsel, and will content ourselves by calling attention t
what is said on that subject in the case of *Royal Arcanu*
v. *Green*, 237 U. S. 531, at l. c. 546-547.

This Court, in *Magwire* v. *Tyler*, 17 Wall. 253, at l.
286, construed Section 922, R. S. Mo. 1939, in the yea
1873, at which time it was in the identical form in whic
it was on December 30, 1944. This Court there said:

> "By the same statute it is enacted that the defend
> ant may demur to the petition when it shall appea
> upon the face thereof, either—(1) That the cour
> has no jurisdiction of the person of the defendant o
> the subject-matter of the action. (2) That the plain
> tiff has not legal capacity to sue. (3) That there i
> another action pending between the same parties fo
> the same cause of action in the state. (4) That ther
> is a defect of parties plaintiff or defendant. (5) Tha
> several causes of action have been improperly united
> (6) That the petition does not state facts sufficien
> to constitute a cause of action. (7) That a party
> plaintiff or defendant, is not a necessary party to
> complete determination of the action. 2 Rev. Stat
> 1231."
>
> *"No other grounds of demurrer are allowed by the statutory rules of pleading."* (Italics ours.)

Appellants, in their point V on pages 12-14 of thei
suggestions in support of the motion sought to be stricken
call attention to the fact that the Missouri Supreme Cour
twice, and the Missouri Court of Appeals once, construed
said Section 922, R. S. Mo. 1939, as this Court construed
it. They call attention to the decision of the Supreme

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Court of Missouri *en banc* wherein it held that by re-adopting a construed statute without change, the construction became a part of the statute itself, which the court was powerless to change, and which could be changed only by the legislature. (*Ex parte Carey*, 306 Mo. 287, l. c. 294.)

Said decision *en banc* was binding on Division 1 of the Supreme Court of Missouri, not only in this case, but in the cases of *Nieuhaus* v. *Jos. Greenspon's Son Pipe Corp.*, 237 Mo. App. 112, and *Rockwood* v. *Crown Laundry Co.*, 352 Mo. 561.

The Missouri court *en banc*, in *State ex rel. Hopkins* v. *Daues*, 319 Mo. at l. c. 740, ruled:

> "There can be no question about the correctness of relator's contention that a decision of the court *en banc* is controlling, not only upon the appellate and all inferior courts, but upon the divisions of the Supreme Court as well. All inferior courts are bound to follow the latest controlling decision of this court. Although the decision of a division of the court upon a given question is later in point of time than a decision of the court *en banc* upon the same question, the decision of the court *en banc* is nevertheless the controlling decision. If there is conflict between the later divisional opinion and the earlier decision of the court *en banc*, it is the duty of all inferior courts, including the divisions of the Supreme Court itself, to follow the decision of the Supreme Court *en banc*."

The decision of this Court in *Magwire* v. *Tyler, supra*, was binding on the Supreme Court of Missouri in every case in which a Federal question was involved, when it held that no ground not specified in the statute could constitute a ground of demurrer so as to defeat a Federal right.

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The decisions of the courts of Missouri in *Nieuhaus* v. *Jos. Greenspon's Son Pipe Corp.*, 237 Mo. App. 112, and *Rockwood* v. *Crown Laundry Co.*, 352 Mo. 561, are in direct conflict with the case of *Magwire* v. *Tyler*, 17 Wall. 253, l. c. 286, in that expressions are used in the opinions to the effect that a Federal right can be lawfully denied on the ground of misjoinder of parties plaintiff in a case where a Federal right is involved in a Missouri court by alleging a ground of demurrer excluded from the statute.

Said decisions are also in conflict with the following decisions by the Supreme Court of Tennessee on the same identical question construing the same identical Federal law: *Hunt* v. *National Linen Service Corp.*, 157 S. W. (2d) 608, and *Burns* v. *Gilpin*, 188 S. W. (2d) 338.

Conclusion.

Burt v. *City of New York*, 156 Fed. (2d) 791 (C. C. A. 2), agrees with the decision in *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240 (C. C. A. 3).

Those decisions are in conflict with the decision of the Supreme Court of Missouri in this case, in holding that Mrs. Moffett has no right to recover under the Civil Rights Acts, and establish that if the conflict is to be settled by this Court, the record must be printed, and appellees' motion to strike be denied.

Respectfully submitted,

A. E. Watson,
Martin J. O'Donnell,
Attorneys for Appellants.

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